IN THE

SUPREME COURT OF THE UNITED STATES

---

SERGIO DURAN BADILLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

# PETITION FOR WRIT OF CERTIORARI

---

**John D. Kaufmann**
Attorney At Law
Suite 905 Transamerica Bldg.
177 N. Church Avenue
Tucson, Arizona 85701
(520) 623-2016 Fax (520) 623-8715

Arizona State Bar No. 004156
Pima County Computer No. 30436

## Question Presented For Review

1. WHETHER THE FIFTH AND SIXTH AMENDMENTS' GUARANTEE OF DUE PROCESS, FAIR TRIAL AND JURY TRIAL IS VIOLATED BY A PERMISSIVE INFERENCE INSTRUCTION CONCERNING THE SOLE ISSUE BEFORE THE TRIER OF FACT

In this case, the Tenth Circuit affirmed a permissive inference jury instruction concerning the sole issue (of knowledge) in dispute and affirmed the imposition of a sentence enhancement (obstructing justice) based on the jury verdict. The permissive instruction violates the Fifth Amendments Due Process Right to fair trial, the Sixth Amendment Right to fair trial and jury determination, and Article III's implementation of the Court's supervisory powers over lesser courts to insure fair trial. The inference affected both verdict and sentencing.

Any presumption instruction is constitutionally infirm. Even a "permissive presumption" interferes with fundamental constitutional guarantees of due process and fair trial. In a jury trial such as Badilla's, the jury and not the court is the ultimate fact finder. The court interferes with the jury role when it tells a jury they may presume facts from evidence. When the court does so, it steps down from its constitutional role of impartiality (for justice is blind) and assists the government in proving its case. The presumption skews the burden of

proof and the presumption of innocence. It is a fallacy to suggest the permissive nature of the instruction cures constitutional defect. The presumption gives the jury an instruction manual on how to resolve ultimate issues. To say "you don't have to use the manual" ignores reality. It not easy to sit in judgment. A juror uses the manual to make his or her job easier.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES PAGE

**STATUTES**



**RULES**



**APPENDIX**

No. _____

---

IN THE

SUPREME COURT OF THE UNITED STATES

---

SERGIO DURAN BADILLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

Petitioner Sergio Duran Badilla requests this Court issue a Writ of Certiorari to review the judgment, decree and order of the Tenth Circuit Court of Appeals entered August 17, 2005 in appellate cause No. 03-2183.

**Opinion and Orders Below**

The published order, judgment and decision of the Tenth Circuit Court of Appeals in *United States v. Sergio Duran Badilla*, CA#03-2183 was filed on August 17, 2005 and is attached hereto as Appendix A. The case was before the Tenth Circuit after remand by

this Court in Cause # 04-762. The prior decision of the Tenth Circuit was vacated and the matter remanded in light of the Court's decision. *USA v. Booker*, 125 S.Ct 738(2005).

**Statement of Jurisdiction**

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and §210(c), to review the Judgment, Decree and Order of the Tenth Circuit Court of Appeals issued in this case on August 12, 2004. This Petition for Writ of Certiorari is mailed within 90 days of August 12, 2004; is timely filed; and is served pursuant to Rules 13(3) and 29(4), Rules of the Supreme Court of the United States.

**Constitutional Provisions**

1) Fifth Amendment to the United States Constitution provides in relevant part:

No person shall be deprived of life, liberty or property without due process of law;

2) Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury;

3) Article III, United States Constitution, §1, provides:

The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

## Statement of the Case

### A) Facts

Mr. Badilla was indicted and convicted for knowingly and intentionally possessing more than 100 kilograms of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1) and (b)(1)(B) and 18 U.S.C. §2. Mr. Badilla exercised his right to jury trial; he took the stand in his own defense and testified under oath that he had no knowledge of the 217 kilograms of marijuana, wrapped in 37 individual bundles and found in a hidden compartment which ran the length of his truck bed.

Mr. Badilla was the sole occupant of the pickup truck. The pickup truck was stopped at a Border Patrol Checkpoint near Truth or Consequences, New Mexico. After a K-9 alerted at a secondary checkpoint, a search was conducted and the marijuana discovered in the hidden compartment. The only issue (contested by Mr. Badilla at his trial) was whether or not he knew the marijuana was located in the secret compartment of his vehicle.

Over Mr. Badilla's objection, the Trial Court gave the following instruction:

> *With respect to the question of whether or not the Defendant knew that a controlled substant was present, you may-but are not required to-infer that the driver and sole occupant of the vehicle has knowledge of the controlled substance within it.*

In addition to the above instruction, the Court gave several more inference instructions including:

1. When knowledge of the existence of a particular fact is an element of the

offense, such knowledge is established if a person is aware of the high probability of its existence, unless he actually believes that it does not exist.

2. Knowledge can be inferred if the Defendant deliberately blinded himself to the existence of a fact that otherwise would have been obvious to him. [1]

At sentencing, the District Court Judge added an enhancement of two levels pursuant to U.S.S.G. §3C1.1. The Trial Court found Mr. Badilla willfully impeded or obstructed justice by denying his knowledge under oath at his trial and before the jury.

Although Mr. Badilla objected to the enhancement, he did not raise the issue recently resolved by this Court in *Blakely v. Washington*, 124 S.Ct. 2531(2004). Mr. Badilla's case was fully briefed by March 2004; argued in the first week of May, 2004 and decided approximately seven weeks after this Court's decision in *Blakely*. By Motion, Mr. Badilla requested the Tenth Circuit consider this Court's decision in *Blakely*; apply *Blakely* to United States Sentencing Guidelines; and vacate the enhancement. Since Mr. Badilla had not raised the *Blakely* issue at the District Court, the Circuit Court declined to reverse Mr. Badilla's sentence under plain error review.

Mr. Badilla filed a Petition for Writ of Certiorari which was granted by this Court. After deciding *USA v. Booker*, 125 S.Ct 738(2005) the opinion below was vacated and the matter remanded.

After remand, the Tenth Circuit upheld the permissive instruction, relying on *Ulster County v. Allen*, 442 U.S. 140(1979). In

[1] Mr. Badilla only objected to the italicized instruction. Supra. All instructions can be found in Appendix two.

refusing to remand to District Court for re-sentencing the Circuit Court held that Mr. Badilla had not been denied a substantial right and therefore no further review was necessary.

The issue was whether it was appropriate for the District Court to consider "perjury or obstruction of justice" in determining Mr. Badilla's sentence. The Circuit Court held it was appropriate as the enhancement was *Blakely* complaint. Since the jury had discounted Mr. Badilla's sworn testimony in its verdict, the jury "must necessarily found the Badilla's testimony...was false." See Appendix 1, Opinion of Tenth Circuit. The sentence, like the verdict, is infected by the permissive instruction.

**B) Related Case**

Mr. Badilla notes the existence of a second case, *United States v. Cota-Meza*, 367 F.3d 1218(10th Cir. 2004), previously before this Court on Petition for Writ of Certiorari from the Tenth Circuit on the same issue. In both decisions, the Tenth Circuit, with two different panels sitting, noted that the permissive instruction in question was not a model of clarity and that the Court (Tenth Circuit) would not have chosen to so instruct a jury. The Tenth Circuit notes that permissive inference instructions have been roundly criticized for wrongfully influencing a jury. However, in both cases, the Tenth Circuit stated that "a permissive instruction is valid if there is a rational connection between the fact that the prosecution proved and the ultimate fact presumed, and the latter is more likely than not to flow from the former". Both cases permit the Trial judge to make the threshold decision concerning "more likely than not". Both cases see no constitutional impediment to the giving of the instruction citing *Ulster County v. Allen*, 442 U.S. 140(1979). The Tenth Circuit declined to use its supervisory powers to exclude the permissive inference instruction in cases where the inference goes to the only issue before the trier of fact. The Court has declined to accept jurisdiction over the Writ in Cota-Meza's case.

**Reasons for Granting the Petition-Writ**

1. Conflict with Ninth Circuit – Permissive Inference Instruction, Not Permitted

The Ninth Circuit has considered, rejected and determined that the permissive inference instruction given in this case is reversible error. *United States v. Rubio-Villareal*, 967 F.2d 294(9th Cir. 1992). After raising Fifth and Sixth Amendment issues, the Ninth Circuit based its decision upon the exercise of its supervisory authority. There is a direct conflict with the Tenth Circuit.

2. Conflict with Fifth Circuit – Inference Not Permitted

In direct conflict with the Tenth Circuit, the Fifth Circuit holds knowledge of a controlled substance (present in a vehicle) may not be inferred from exclusive control over the vehicle if the substance is located in a hidden compartment. *United States v. Diaz-Carreon*, 915 F.2d 951(5th Cir. 1990), *United States v. Ortega-Reyna*, 148 F.3d 540(5th Cir. 1998). See also, *United States v. Anchondo-Sandoval*, 910 F.2d 1234(5th Cir. 1990). The circuit has determined that the threshold question of "more likely than not", is a jury question that should be resolved without judicial interference.

3. Conflict with Third Circuit – Inference Not Permitted

The Circuit holds that constructive possession of a vehicle containing contraband, standing alone, is not sufficient to prove guilt knowledge and constructive possession. *United States v. Iafelice*, 978 F.2d 92(3rd Cir. 1992).

4. Counsel can find no other Circuit who gives this permissive instruction.

## Argument for Allowance of Writ

### 1. THE FIFTH AND SIXTH AMENDMENTS' GUARANTEE OF DUE PROCESS, FAIR TRIAL AND JURY TRIAL IS VIOLATED BY A PERMISSIVE INFERENCE INSTRUCTION CONCERNING THE SOLE ISSUE BEFORE THE TRIER OF FACT

An important question of constitutional law concerning permissive inference instruction (first addressed in *Ulster County v. Allen*, supra) has not been settled. In *Ulster County*, this Court held that permissive instructions do not implicate the due process clause as defined by the Fourteenth Amendment. The Court has not considered whether permissive inferential instructions violate either the Fifth Amendment right to due process and fair trial, the Sixth Amendment right to fair trial and jury trial, or whether the Courts supervisory role requires reconsideration and clarification of its *Ulster County* holding.

A string of recent Supreme Court cases including *Apprendi v. New Jersey*, 530 U.S. 466(2000); *Ring v. Arizona, 536 U.S. 584(2002)*; and *Blakely v. Washington*, supra, have recently identified this Court's desire to protect jury determination of all issues concerning guilt and punishment. The permissive inference instruction interferes with jury determination.

The only reason to give the inferential instruction on knowledge in Mr. Badilla's case was to assist the government in proving the sole element in dispute. The instruction permits the judge to tell a jury what it can infer. The judge tells the jury that it can not ignore the Court's instructions on law. This Court has continuously held that the government must prove every element of an offense and any type of instruction violates due process if it reduces the government's burden. *In re: Winship*, 397 U.S. 358(1970); *Sandstrom v. Montana*, 442 U.S. 510(1979); *Ulster County v. Allen*, supra. A permissive inference is designed to reduce the governments burden and violates due process right to fair trial as guaranteed by the Fifth and Sixth Amendment.

In *Ulster County v. Allen*, this Court upheld permissive inferences under the due process clause of the Fourteenth Amendment as long as it can be said with substantial assurance that the inferred fact is more likely than not to flow from an approved fact on which it is made to depend. In *Ulster* the Supreme Court gave no direction as to how to determine whether an inferred fact is more likely than not to flow from an approved fact. This Court permitted trial judges to become gate keepers concerning "more likely than not". The Court went on to say that some presumptive inferences may still constitute a violation of the Fourteenth due process clause and prohibition against judicial comment if it has the effect of shifting the burden of proof to the Defendant in any manner.

The gate keeper function interferes with a jury's exclusive right to weigh facts. Traditionally the "gate keeper function" of a trial court was limited to the existence of facts. Trial Courts were asked to determine if facts exist that would support a prosecution or defense. Once the Courts make that decision, it is up to the jury to weigh facts against a burden of proof standard. When the Court weighs facts in criminal cases, it violates Sixth Amendment right of jury determination. Weighing is not the function of a neutral judicial officer when a jury has been impaneled.

This Court must review how its ruling in *Ulster* is being applied. The twenty five years that have passed since *Ulster*. During this time, Federal Courts have been reticent to give permissive inference instructions. Petitioner can find no other circuit that approves the permissive inference instruction given in this case and grudgingly approved by the Tenth Circuit. While the Tenth Circuit applies *Ulster County* broadly, all other circuits seek to narrow its application raising both 5th and 6th Amendment objections.

The danger of a permissive inference highlights 5th and 6th amendment issues. The instruction focuses the jury on one fact (sole possession of a motor vehicle) rather than the totality of evidence. In a one issue case, it gives undue judicial emphasis to a particular piece of

evidence. It permits a trial judge and not a jury to determine that an inferred fact is more likely than not to flow from a proven fact. It violates the defendant's Sixth Amendment Right to fair trial and trial by an impartial jury.

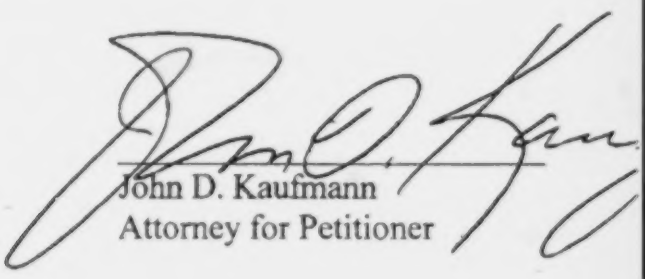
In Mr. Badilla's case, the jury was told by a judge that they may, but were not required to, infer that the driver and sole occupant of the vehicle had knowledge of the controlled substance within it. The instruction permits a judge to comment on how to apply the law. To say the jury is not required by the instruction to infer, begs the issue of how a jury reacts to judicial instructions that they are ordered generically to follow. The instruction reduces the government's burden of proof. The sole intent of the instruction is to reduce and assist the government in its burden of proof. It allows for the government to rely upon the instruction to prove its case. It reduces jury fact finding.

Petitioner is requesting this Court reevaluate its Fifth Amendment Due Process constraints concerning fair trial and judicial comment. The Defendant requests the Court apply the Sixth Amendment prohibition on judicial comment and guarantee fair trial and jury trial to prohibit permissive instructions where it concerns the sole issue in a case. Finally Petitioner requests the Court exercise the Court's supervisory authority and reject these types of permissive inferences in cases that constitute judicial comment on evidence concerning sole issues of fact before the jury.

## Conclusion

For these reasons, Petitioner Sergio Duran Badilla respectfully requests this Court grant his Petition for Writ of Certiorari.

**RESPECTFULLY SUBMITTED** this 14 day of December, 2005.



John D. Kaufmann
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I, **JOHN D. KAUFMANN**, attorney for Petitioner, declares under penalty of perjury that the following is true and correct:

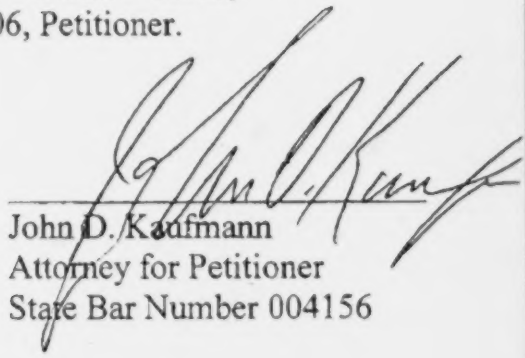
That in accordance with Rule 29.2, Supreme Court Rules, he has property deposited in a Federal Express facility, the original and forty (40) copies of Petitioner's **Petition For Writ Of Certiorari** to be forwarded to the Clerk of the Supreme Court of the United States of America within the period prescribed in Rule 13.1, Supreme Court Rules;

That in accordance with Rule 29.5, Supreme Court Rules, three (3) copies of this **Petition For Writ of Certiorari** have this 14th day of December, 2005, been mailed via United States Postal Service mail, first class postage prepaid to United States Attorney's Office, Norman Cairns, PO Box 607, Albuquerque, NM 87103;

Three (3) copies via United States Postal Service mail, first class postage prepaid to the Honorable Paul Clement, Solicitor General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Room 5614, Washington D.C. 20530;

One (1) copy via United States Postal Service mail, first class postage

prepaid to Sergio Badilla, #23111, FCI-Tucson, 901 S. Wilmot Road, Tucson, Arizona 85706, Petitioner.



John D. Kaufmann
Attorney for Petitioner
State Bar Number 004156

**APPENDIX 1 – Opinion of Tenth Circuit Court**

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

---

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | No. 03-2183 |
| v. | ) | (CR-02-1791 MV) |
| | ) | (D. N.M.) |
| SERGIO DURAN BADILLA, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |

---

ON REMAND FROM THE
UNITED STATES SUPREME COURT

---

John D. Kaufmann, Attorney at Law, Tucson, Arizona, for Defendant-Appellant.

David N. Williams, Assistant United States Attorney (David C. Iglesias, United States Attorney Norman Cairns, Assistant United States Attorney, on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

---

Before **SEYMOUR, HOLLOWAY** and **MURPHY**, Circuit Judges.

---

**MURPHY**, Circuit Judge.

---

Sergio Duran Badilla was convicted by a jury of a single count of knowingly and intentionally possessing more than one hundred kilograms of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1), (b)(1)(B) and 18 U.S.C. §2. The district court sentenced Badilla to seventy-eight months' imprisonment and four years' supervised release. Badilla brought an appeal to this court and raised the following three claims: (1) the district court erred in giving the jury an instruction allowing it to infer that Badilla knew about the presence of the marijuana in his vehicle because he was the driver and occupant of the vehicle; (2) the district court should have suppressed the marijuana as the fruit of an illegal search; and (3) the district court erred when it increased his base offense level by two levels for obstruction of justice. This court rejected Badilla's claims of error and affirmed both his conviction and his sentence. *United States v. Badilla*, 383 F.3d 1137(10th Cir. 2004). Badilla petitioned the Supreme Court for a writ of certiorari. The Court granted certiorari, vacated our judgment, and remanded the case to the court for further consideration in light of *United States v.*

*Booker*, 125 S. Ct. 738 (2005). For the reasons set out below, we reinstate all portions of our prior decision with the exception of footnote two and again affirm Badilla's conviction and sentence.

This court asked the parties to file supplemental briefs addressing the impact of *Booker* on this case. In his supplement *Booker* brief, Badilla asserts as follows: (1) *Booker* mandates a reconsideration of the propriety of permissive inference jury instructions; and (2) pursuant to *Booker*, the district court erred in enhancing his sentence on the basis of judge-found facts. We address these assertions in turn.

Badilla was stopped at a permanent Border Patrol checkpoint in New Mexico. *Badilla*, 383 F.3d at 1139. He was the sole occupant of a pick-up truck that contained 217 kilograms of marijuana in a hidden compartment under the truck bed. *Id.* Badilla testified at trial that he was unaware of the marijuana until informed of its presence by the Border Patrol agents. *Id.* As to Badilla's knowledge, the district court instructed the jury as follows: "[w]ith respect to the question of whether or not a defendant knew that the controlled substance was present, you

may-but are not required to-infer that the driver and sole occupant of a vehicle has knowledge of the controlled substance within it." *Id.* (quotation omitted). The district court further instructed the jury that

> (1) it must consider the jury instructions as a whole; (2) it should not assume that anything the judge said during trial expressed his opinion concerning the issues in the case; (3) it must arrive at its own fact findings; (4) it must consider all of the evidence; and (5) the government had the burden of proving Badilla's guilt beyond a reasonable doubt.

*Id.* At 1139-40.

On appeal from his conviction, Badilla argued that the district court had erred in giving the jury the permissive inference instruction. *Id.* at 1140. This court rejected Badilla's contention, concluding that in the context of this particular case, the permissive inference instruction "[did] not undermine the jury's ability to deliberate, [did] not prevent the jury from considering all the evidence in the case, [did] not dilute the government's burden of proving guilt beyond a reasonable doubt, and [did] not shift the burden of proof to Badilla." *Id.* at 1141. In reaching this

result, we relied on the Supreme Court's decision in *County Court of Ulster County v. Allen*, 442 U.S. 140(1979). In *Ulster County*, the Court specifically noted that it "has required the party challenging [a permissive inference] to demonstrate its invalidity as applied to him." *Id.* at 157.

> Because [a] permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

*Id.* Based on the facts adduced at trial,[1] this court concluded that "the inference of Badilla's knowledge of the hidden drugs [was] more likely than not to flow from the undisputed fact of his sole

---

[1] As noted in the prior opinion,

> [t]he totality of the evidence in this case supports an inference that Badilla knew of the marijuana's presence in the vehicle. Badilla owned the truck. The marijuana had an estimated street value of at least $119,515, making it unlikely that the owner of the marijuana would allow it to be stored and transported in a vehicle which is owned and driven by someone who had no knowledge of its presence. The five-inch lift of the truck's cab and bed was visible from outside the vehicle, making the hidden compartment readily discoverable by Badilla. The large volume and weight of the marijuana further supports the inference that Badilla knew or its presence within his vehicle.

*United States v. Badilla*, 383 F.3d 1137, 1140(10th Cir. 2004).

possession of the truck." *Badilla*, 383 F.3d at 1140. Accordingly, we rejected Badilla's challenge to the permissive inference instruction. *Id.* at 1140-41.

In his supplemental brief, Badilla argues that this court's previous analysis of the permissive inference instruction is no longer sound in light of the decision in *Booker*. In particular, Badilla asserts that this court's resolution of his permissive-inference claim relied on a "judicial non-jury determination that one fact is more likely than not to flow from another fact." Badilla Supplemental BR. At 7; *see Badilla*, 383 F.3d at 1140 ("A permissive inference instruction is valid if there is a rational connection between the fact that the prosecution proved and the ultimate fact presumed, and the latter is more likely than not to flow from the former."). According to Badilla, judges have no right to make such a determination under *Booker*. Badilla Supplemental BR. At 7("The judicial determination of 'more likely than not' is an invasion of the jury function and a violation of the Sixth Amendment.").

The problem with Badilla's argument is that it is squarely foreclosed by the Court's decision in *Ulster County*. *Ulster County* makes clear that permissive inference instructions like the one at issue in this case do not invade the jury's factfinding function as long as there is a "rational way the trier could make the connection permitted by the inference." 442 U.S. at 157; *see also United States v. Cota-Meza*, 367 F.3d 1218, 1221-22 (discussing *Ulster County*). Such a connection is rational in this case in light of the facts developed at trial. *See supra* note 1(setting out the totality of evidence in this case supporting an inference that Badilla knew of the marijuana's presence in the vehicle); *Ulster County*, 442 U.S. at 157(holding that a party challenging a permissive inference instruction is required to demonstrate its invalidity as applied to him). Contrary to Badilla's assertions, there is simply nothing in *Booker* that calls into question the Court's decision in *Ulster County*.[2]

---

[2] Even assuming that there is some tension between *Booker* and *Ulster County*, a dubious assumption at best, this court is obligated to apply *Ulster County* to resolve Badilla's claims regarding the permissive (continued...)

Badilla also argues that he is entitled to resentencing in light of *Booker*. Because Badilla did not raise this claim before the district court, we review only for plain error. *United States v. Gonzalez-Huerta*, 403 U.S. 727, 732(10th Cir. 2005)(en banc). "Under that test, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) affects substantial rights." *United States v. Cotton*, 535 U.S. 625, 631(2002) (quotations and alteration omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 631-32(quotation and alteration omitted).

There are two distinct types of sentencing errors that a court could make in light of *Booker*. *Gonzalez-Huerta*, 403 F.3d

---

inference instruction. As the Supreme Court has made clear, "if a precedent of [the] Court has directed application in a case, yet appears to rest on reasons rejected in some other line of decision, the Court of Appeals should follow the case which directly controls, leaving to [the] Court the prerogative of overruling its own decision." *Agostini v. Felton*, 521 U.S. 203, 237 (1997)(quotation and alteration omitted).

at 731.[3] A sentencing court could violate the Sixth Amendment "by relying upon judge-found facts, other than those of prior convictions, to enhance a defendant's sentence mandatorily." *Id.* Alternatively, "a sentencing court could err by applying the Guidelines in a mandatory fashion, as opposed to a discretionary

---

[3] The dichotomous nature of *Booker* errors flows from the "unique" nature of the remedy adopted by the *Booker* court. *United States v. Gonzalez-Huerta*, 403 F.3d 727, 731(10th Cir. 2005) (en banc). As this court has noted,

> In *Booker*, the Court "reaffirm[ed its] holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 125 S.Ct. at 756. As a result, the Court held that mandatory application of the Guidelines violates the Sixth Amendment when judge-found facts, other than those of prior convictions, are employed to enhance a sentence. The Court constructed a unique remedy to this constitutional infirmity. It severed two provisions of Sentencing Reform Act of 1984, codified at 18 U.S.C. §3551 et seq. Namely, it excised 18 U.S.C. §3553(b)(1), which made the imposition of a Guidelines sentence mandatory in the vast majority of cases, and those portions of 18 U.S.C. §3742(e) that established standards of review on appeal. *Booker*, 125 S.Ct. at 764.
>
> Henceforth, courts are still required to consider the Guidelines in determining sentences, but they are not required to impose a sentence within the Guidelines range. *Id.*

*Gonzalez-Huerta*, 403 F.3d at 731.

fashion, even though the resulting sentence was calculated solely upon the fact of a prior conviction." *Id.* at 731-32.

With this as background, Badilla argues that the district court committed *Booker* error when it increased his base offense level by two levels for obstruction of justice. The government concedes that the district court committed constitutional *Booker* error when it increased Badilla's offense level based on a judicial finding that Badilla lied to the jury at trial when he testified that he was unaware of the presence of the marijuana in the vehicle.[4]

---

[4] Although not raised by Badilla, the government also suggests the district court committed constitutional *Booker* error when it set Badilla's offense level by referencing the amount of marijuana Badilla possessed. *See generally* United States Sentencing Guideline ("U.S.S.G.") §2D1.1 (setting out method of calculating offense levels in offenses involving drugs). The government's suggestion is unfounded. The district court did find, as noted by the government, that Badilla's offense of conviction involved 217 kilograms of marijuana. This judge-found-fact, however, had no ultimate impact on Badilla's offense level. Badilla was indicted and tried for possession with intent to distribute 100 kilograms or more of marijuana in violation of 21 U.S.C. §841(a)(1) and (b)(1)(B). Applying the beyond-a-reasonable-doubt standard, the jury found him guilty of this charge. The Guidelines prescribe a base offense level of twenty-six if the defendant possessed "[a]t least 10 KG but less than 400 KG of Marihuana." U.S.S.G. §2D1.1(a)(3), (c)(7). Accordingly, using only the amount of marijuana found by the jury, Badilla's offense level was correctly set at twenty-six. Because all of the facts necessary to support an offense level of twenty-six for the crime of

(continued...)

The propriety of the government's concession that the district court committed *constitutional Booker* error is far from clear.[5] As noted in this court's prior opinion, Badilla specifically testified at trial that he was unaware of the presence of the marijuana until he was informed by the Border Patrol agents that the dog had alerted. *Badilla*, 383 F.3d at 1139, 1141-42. In finding Badilla guilty of possession with intent to distribute, the jury must have necessarily found that Badilla's testimony on this key question was false. Thus, it could certainly be argued that the jury implicitly found beyond a reasonable doubt the facts necessary to support the application of a U.S.S.G. §3C1.1 adjustment for obstruction of justice. Nevertheless, it is unnecessary to resolve the propriety of the government's concession because, even utilizing the more relaxed plain-error

---

conviction were submitted to the jury and proven beyond a reasonable doubt, there is no constitutional *Booker* error with regard to the drug-quantity component of Badilla's offense level. *United States v. Booker*, 125 S.Ct. 738, 756(2005).

[5] Because the district court treated the Guidelines as mandatory in sentencing Badilla, there is no doubt that the district court committed non-constitutional *Booker* error. *Gonzalez-Huerta*, 403 F.3d at 731-32.

standard applicable to constitutional errors, Badilla has failed to demonstrate his entitlement to relief. See *United States v. Trujillo-Terrazas,* 405 F.3d 814, 818 (10th Cir. 2005)(noting that the plain-error "analysis is relaxed when applied to potential constitutional error").

For those reasons set out above, we proceed under the assumption that the district court committed a constitutional *Booker* error when it increased Badilla's offense level by two levels for obstruction of justice. This error amounts to plain error sufficient to satisfy the first two prongs of the plain-error analysis. *United States v. Dazey*, 403 F.3d 1147, 1174-75(10th Cir. 2005). Moving to the third prong of the plain-error analysis, Badilla has the burden of establishing that the district court affected his substantial rights. *Id.* at 1175 ("The burden to establish prejudice to substantial rights is on the party that failed to raise the issue below."). "For an error to have affected substantial rights, the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Id.* (quotation omitted).

> In a case of constitutional *Booker* error, there are at least two ways a defendant can make this showing. First, if the defendant shows a reasonable probability that a jury applying a reasonable doubt standard would not have found the same material facts that a judge found by a preponderance of the evidence, then the defendant successfully demonstrates that the error below affected his substantial rights. This inquiry requires the appellate court to review the evidence submitted at the sentencing hearing and the factual basis for any objection to the defendant may have made to the facts on which the sentence was predicated. Second, a defendant may show that the district court's error affected his substantial rights by demonstrating a reasonable probability that, under the specific facts of his case as analyzed under the sentencing factors of 18 U.S.C. §3553(a), the district court's error affected his substantial rights by demonstrating a reasonable probability that, under the specific facts of his case as analyzed under the sentencing factors of 18 U.S.C. §3553(a), the district court judge would reasonably impose a sentence outside the Guidelines range. For example, if during sentencing the district court expressed its view that the defendant's conduct, based on the record, did not warrant the minimum Guidelines sentence, this might well be sufficient to conclude that the defendant had shown that the *Booker* error affected the defendant's substantial rights.

*Dazey,* 403 F.3d at 1175 (footnotes omitted).

Badilla does not satisfy either of the two alternative methods of demonstrating an effect on substantial rights

identified in *Dazey*. As to the second alternative identified in *Dazey*, Badilla does not point to any evidence in the record that the judge believed the Guidelines range was excessive in light of the record before the court. In fact, as candidly admitted by Badilla, "[t]he record in this case does not provide an answer to whether the judge would have imposed a different sentence had the [G]uidelines been viewed as advisory." Badilla Supplemental BR. at 9. Without any evidence in the record indicating that the district court would likely impose a sentence outside of the Guidelines range, Badilla falls back on a request that this court "remand the matter back to the trial judge for determination of whether his sentence would have been different under non-mandatory [G]uidelines." *Id.* This court has specifically held, however, that such an approach is "inconsistent with plain error doctrine" because "plain error must be assessed based upon the record on appeal." *Gonzalez-Huerta,* 403 F.3d at 733 n.4.

Badilla does not even argue that he can establish that his substantial rights were affected under the first alternative identified in *Dazey*. In any event, a review of the record on

appeal makes clear that the jury would most certainly have found beyond a reasonable doubt the predicate facts necessary to support the district court's obstruction of justice enhancement. As noted above, despite Badilla's trial testimony that he was unaware of the presence of marijuana in the vehicle, the jury found Badilla guilty of possession of more than 100 kilograms of marijuana with intent to distribute. Implicit in the jury's guilty verdict is a conclusion that Badilla lied on the witness stand about the central issue in the case.

Because there is no doubt that the jury would have found beyond a reasonable doubt the factual predicates necessary to support the district court's obstruction of justice enhancement and because there is no indication in the record on appeal that the district court would impose a sentence outside the Guideline range, Badilla has not demonstrated that the application of that enhancement on the basis of judge-found facts affected this substantial rights. As Badilla has failed to establish that his substantial rights were affected by the district court's application

of the obstruction of justice enhancement, there is no need to proceed on to the fourth prong of the plain error analysis.

For those reasons set out above, this court reinstates all portions of our prior decision, with the exception of footnote two, and again affirms Badilla's conviction and sentence.

**APPENDIX 2 – Jury Instructions**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW MEXICO**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | No. 02-1791 JC |
| v. | ) | |
| | ) | |
| SERGIO DURAN BADILLA, | ) | |
| | ) | |
| Defendant. | ) | |

COURT'S PROPOSED JURY INSTRUCTIONS

MEMBERS OF THE JURY:

You may now begin your deliberations.

Time:_____

Date:_____

_____

SENIOR UNITED STATES DISTRICT JUDGE

## INSTRUCTION NO. 2

You, as jurors, are the judges of the facts. But in determining what actually happened – that is, in reaching your decision as to the facts – it is your sworn duty to follow all of the rules of law as I explain them to you.

And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

## INSTRUCTION NO. 3

The indictment or formal charge against a Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his innocence or produce any evidence at all. The Government has the burden of proving the Defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the Defendant.

While the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

**INSTRUCTION NO. 4**

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

During the trial, I sustained objections to certain questions. You must disregard those questions entirely. Do not speculate as to what the witness would have said if permitted to answer the question. Your verdict must be based solely on the legally admissible evidence and testimony.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

**INSTRUCTION NO. 5**

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

You should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that something is or is not a fact. The law makes no distinction between the weight you may give to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the Defendant's guilty beyond a reasonable doubt before the Defendant can be convicted.

## INSTRUCTION NO. 6

I remind you that it is your job to decide whether the Government has proved the guilty of the Defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses, including the Defendant, who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision, I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the Government or the defense? Did the witness seem to have a good memory? Did the witness ha e the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of the other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

The testimony of the Defendant should be weighed and his credibility evaluated in the same way as that of any other witness.

Your job is to think of the testimony of each witness you have heard and decide how much you believe of what each witness had to say. In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than the other. Do not reach a conclusion no a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

**INSTRUCTION NO. 7**

The testimony of a witness may be discredited by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

Earlier statements of a witness were not admitted in evidence to prove that the contents of those statements are true. You may consider the earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves.

**INSTRUCTION NO. 7A**

During the trial, you heard the testimony of experts who have expressed certain opinions. If scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters.

Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. You should judge such testimony like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, that soundness of the reasons given for the opinion, and all other evidence in the case.

**INSTRUCTION NO. 8**

You are here to decide whether the Government has proved beyond a reasonable doubt that the Defendant is guilty of the crime charged. The Defendant is no ton trial for any act, conduct, or offense not alleged in the Indictment. Neither are you concerned with the guilty of any other person or persons not on trial as a Defendant in this case.

**INSTRUCTION NO. 8A**

The defendant is on trial before you upon an indictment brought by the Grand Jury charging as follows:

On or about the 1st day of July, 2002 in Sierra County, in the State and District of New Mexico, the defendant, **SERGIO DURAN BADILLA,** did unlawfully, knowingly and intentionally possess with intent to distribute 100 kilograms and more of Marijuana, a Schedule I controlled substance.

In violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §841(b)(1)(B) and 18 U.S.C. §2.

*First*: That the offense of possession with intent to distribute marijuana was committed by some person;

*Second*: That the defendant associated with the criminal venture;

*Third*: That the Defendant purposefully participated in the criminal venture; and

*Fourth*: That the defendant sought by action to make that venture successful.

"To associate with the criminal venture" means that the defendant shared the criminal intent of the principal. This element cannot be established if the defendant had no knowledge of the principal's criminal venture.

"To participate in the criminal venture" means that the defendant engaged in some affirmative conduct designed to aid the venture or assisted the principal of the crime.

**INSTRUCTION NO. 8B**

You will note that the indictment charges that the offense was committed "on or about" a specified date. The Government does not have to prove that the crime was committed on that exact date, so long as the Government proves beyond a reasonable doubt that the crime was committed on a date reasonably near the date stated in the indictment.

**INSTRUCTION NO. 8C**

Title 21, United States Code, Section 841(a), makes it a crime for anyone knowingly or intentionally to possess a controlled substance with the intent to distribute it.

Marijuana is a controlled substance within the meaning of this law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First*: That the defendant knowingly possessed a controlled substance,

*Second*: That the controlled substance was in fact marijuana;

*Third*: That the defendant possessed the substance with the intent to distribute it; and

*Fourth*: That the quantity of the substance was at least 100 kilograms.

To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

**INSTRUCTION NO. 8D**

Possession, as that term is used in this case, may be of two kinds: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

**INSTRUCTION NO. 8E**

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

**INSTRUCTION NO. 8F**

With respect to the question of whether or not a defendant knew that the controlled substance was present, you may – but are not required to – infer that the driver and sole occupant of a vehicle has knowledge of the controlled substance within it.

**INSTRUCTION NO. 8G**

With respect to the question of whether or not a defendant intended to distribute any controlled substance, you are instructed that the quantity of the controlled substance allegedly possessed by a defendant, if proved, may be considered by the jury in the light of all of the other evidence in the case in determining whether or not a defendant intended to distribute any such substance. Whether or not evidence of a particular quantity of substance shows an intent to distribute the same, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

**INSTRUCTION NO. 8H**

The word "knowingly" as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally.

When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist. While knowledge no the part of the defendant cannot be established merely by demonstrating that the defendant recklessly disregarded the truth, or that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact tat otherwise would have been obvious to him. Stated another way, if a person with a lurking suspicion goes on as before and avoids further knowledge, this may support an inference that he has deduced the truth and is simply trying to avoid giving the appearance of knowledge in order to have a defense in the event of a subsequent prosecution.

**INSTRUCTION NO. 8I**

If the Defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

## INSTRUCTION NO. 9

To reach a verdict, whether it is guilty, all of you must agree. Your verdict must be unanimous. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up you honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges - - judges of the facts. Your duty is to decide whether the Government has proved the Defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A form of verdict has been prepared for your convenience.

The foreperson will write the unanimous answer of the jury in the space provided, either guilty or not guilty. At the conclusion of your deliberations, the foreperson must date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson must write the message and give it to the marshal. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even the court, how the jury stands, numerically or otherwise until after you have reached a unanimous verdict.